

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

NORTHERN DIVISION

In re:	)	
	)	
CHRISTOPHER JOSEPH TUVELL,	)	
SHERRY LYNN TUVELL,	)	
individually and as the heirs	)	
of David Christopher Tuvell,	)	
and THE ESTATE OF DAVID	)	
CHRISTOPHER TUVELL,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:12-CV-128DB
	)	
BOY SCOUTS OF AMERICA, et al.,	)	
	)	
Defendants.	)	

Transcript of Hearing on Motion  
to Amend Complaint

BEFORE THE HONORABLE DEE BENSON

October 14, 2014

Karen Murakami, CSR, RPR  
8.430 U.S. Courthouse  
351 South West Temple  
Salt Lake City, Utah 84101  
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APPEARANCES OF COUNSEL:

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1           Salt Lake City, Utah, Tuesday, October 14, 2014

2                               \*   \*   \*

3                   THE COURT:   Good afternoon.   We're back in  
4   Tuvell v. Boys Scouts, 12-cv-128, and what the court has  
5   before it is Plaintiffs' Motion for Leave to File First  
6   Amended Complaint.   And this is opposed by the  
7   defendants Blue Water Scuba, Lowell Huber, and Corbett  
8   Douglas.   And I need to know who represents whom.   Would  
9   you mind just standing here first and tell me.

10                  MR. GILCHRIST:   Certainly, Bob Gilchrist for  
11   the plaintiffs, Your Honor.

12                  THE COURT:   Thank you, Mr. Gilchrist.

13                  MR. WALDBILLIG:   Gainer Waldbillig for the  
14   Blue Water defendants, Huber, and Douglas.

15                  THE COURT:   All right.   Thank you.

16                  MR. BULLOCK:   Roger Bullock and Spencer  
17   Brown for PADI, Professional Association of Dive  
18   Instructors.

19                  THE COURT:   Thank you.   And I think it's  
20   fair to say that PADI agrees with the motion, correct --

21                  MR. BULLOCK:   That's correct.

22                  THE COURT:   -- Mr. Bullock?

23                  All right.   Let me hear your arguments.  
24   It's your motion, Mr. Gilchrist.

25                  MR. GILCHRIST:   Thank you, Your Honor.

1 THE COURT: It's an intriguing issue.

2 MR. GILCHRIST: It is. I'm local counsel in  
3 this case, which is neither here nor there.

4 THE COURT: Have you ever had this come up  
5 before?

6 MR. GILCHRIST: Never had. Everybody I've  
7 released out of the case has always kind of said, good  
8 riddance and good-bye, and they've wanted to be done  
9 with this.

10 THE COURT: Is your client doing this only  
11 because it agreed to in the settlement agreement?

12 MR. GILCHRIST: Only because they agreed to  
13 it?

14 THE COURT: What other reason would the  
15 plaintiff have for letting PADI come in and defend  
16 itself against a claim of apportionment liability from  
17 Blue Water?

18 MR. GILCHRIST: PADI said they would do it,  
19 and to have someone else standing here, rather than an  
20 empty chair defending is better for us, so I guess  
21 that's another way of saying yes to what you said. But  
22 there's a little bit more to it than --

23 THE COURT: Okay. All right.

24 MR. GILCHRIST: We thought it was a good  
25 idea once they suggested they would do it.

1 THE COURT: Would you mind telling me why  
2 you thought it was a good idea? I guess that's my same  
3 question.

4 MR. GILCHRIST: Okay. Kind of -- because  
5 the Blue Water defendants -- I'm sorry, I shouldn't be  
6 demonstrative -- will be pointing the finger at PADI  
7 saying it's their fault, and we will be defending the  
8 empty chairs, everyone always says. So in this case, it  
9 won't be an empty chair because they will be able to  
10 stand up and say, no, it isn't all our fault like Blue  
11 Water is saying, here's what we did, here's what they  
12 did. So for us to have someone fill that chair is  
13 better than an empty chair.

14 THE COURT: Fair enough. And you think the  
15 statute let's you do this.

16 MR. GILCHRIST: I do, in reading it. The  
17 Boy Scouts don't want to stay in this case, so they  
18 settled like 99.9 percent of other defendants I have  
19 settled with and are gone. But it says 78B-5-821 the  
20 person seeking recovery, which is us, or any defendant,  
21 may join the defendants for -- to determine their  
22 respective proportionate share of fault. I've never  
23 done it, I've never heard of anybody doing it, but it  
24 clearly says that we can do it. So if defendants can do  
25 it, plaintiffs can do it, and --

1           THE COURT: You're not seeking recovery from  
2 the party you're bringing in.

3           MR. GILCHRIST: We're not. We're seeking,  
4 as the statute says, to have determined their respective  
5 proportions of fault. I would have worded it a little  
6 differently, proportionate share of fault, but  
7 proportions of fault. Yes, that's all we're seeking.  
8 The same thing that Blue Water and Huber, they're  
9 seeking to put them on the verdict for their  
10 determination of their percentage of fault, we're doing  
11 the same thing that they want to do. They're going to  
12 be on the verdict. So we're just saying that they want  
13 to defend themselves then they were figuring out a way  
14 for that to occur and that is through the statute that  
15 says they can do it. We can ask them -- ask the court  
16 to do it, just like Blue Water is asking, it's the same  
17 verdict that they want. They just want an empty chair  
18 and we want someone defending the chair, it's as simple  
19 as that, and the statute gives us that right.

20           THE COURT: All right. Thank you.

21           MR. GILCHRIST: You're welcome.

22           THE COURT: Mr. Waldbillig?

23           MR. WALDBILLIG: And I have never in my 30  
24 years ever seen anybody do this before either, even  
25 though in the old days I remember filing contribution

1 claims and it was joint and several there.

2 THE COURT: That's where I began too, so the  
3 whole thing is new. This concept is new to me.

4 MR. WALDBILLIG: Well, it's -- my first  
5 thought was, and the court wasn't here, but I thought it  
6 was aligned really well when PADI was sitting right  
7 there before they moved because I thought that's exactly  
8 what they're trying to pull here is they're going to be  
9 a plaintiff in the lawsuit going forward, if this is  
10 allowed, with no risk, no loss, nothing. They just get  
11 to come in here and help the plaintiffs, which leads me  
12 to wonder what else is there in this settlement that we  
13 don't know about? Who prepared the briefs? Who is  
14 going to pay the expert witnesses? At some point it  
15 starts to wonder what else has gone on.

16 And the reason I'm suspicious, and I  
17 wouldn't have been, except what happened at the  
18 settlement agreement a little earlier when we went  
19 through this whole process and who's pushing it and who  
20 isn't, it makes me wonder really what is going on behind  
21 all of this because what the plaintiff is doing makes  
22 less than zero sense, if that's possible. There is no  
23 reason for them to do it, there is no possible benefit  
24 they could have for it, they've got to defend their  
25 claim against us, now they've got PADI to help them

1 throw us under the bus. Think about the big picture,  
2 only after they now ask the court and wipe out all the  
3 allegations, all the judicial admissions that we made in  
4 our original complaint about PADI, and my clients were  
5 their agents and they worked for them, throw all those  
6 causes of -- get all that out of there, now we'll  
7 sanitize the complaint and we'll throw PADI back in.

8 And take a look at -- for instance, let me  
9 just take -- we know the undue delay and prejudice, but  
10 justice so requires, justice so requires that this  
11 motion be dismissed. There's no justice in what's going  
12 on here. This is an end run around the settlement  
13 agreement that they argue, well, it didn't release this  
14 claim. That's not what the settlement agreement said,  
15 Your Honor. Do you have a copy of it, or can I hand one  
16 up you? We can look at a few provisions of it.

17 THE COURT: Do you refer to it in your  
18 brief?

19 MR. WALDBILLIG: We do in some of it, but  
20 finding the page would be harder than just giving you  
21 the actual agreement.

22 THE COURT: Okay. Hand it up then. You  
23 don't have an extra copy for Jordan, do you, my clerk?

24 MR. WALDBILLIG: Do you guys have a copy of  
25 this?



1 MR. BULLOCK: I do.

2 MR. WALDBILLIG: You know, let's just take  
3 the very first sentence, the very last clause of it,  
4 settles all claims. Let's go down under the provision  
5 that says claims released.

6 THE COURT: It says settles all claims for  
7 damages.

8 MR. WALDBILLIG: All claims of the estate  
9 for damages arising out of. So it's all claims for  
10 damages. So that means they have no interest in  
11 anything at risk in this case when you talk about  
12 there's no case in controversy.

13 THE COURT: But they say this isn't a claim  
14 for damages, this is a claim for apportionment.

15 MR. WALDBILLIG: And go down underneath  
16 where it says claims released, and I'm going to read the  
17 provision, For and in consideration of the payments set  
18 forth below, claimants in each of them release and  
19 discharge all claims and causes of action against  
20 released parties, including -- this is no -- what we cut  
21 out, apportionment, we cut out something else out of  
22 this, it is every cause of action. So whether you call  
23 it a claim or a cause of action, they -- if you go to  
24 their proposed amended answer, if you want to take a  
25 look, do you know what they captioned the claim against

1 PADI? Cause of action.

2 If you don't mind, Your Honor, I can hand  
3 this up as well. And if it's not -- they call it a  
4 cause of action, but if you take a look at paragraph 46,  
5 they even reference the settlement agreement. Oh, we  
6 settled all our claims, including all causes of action,  
7 we were done with all of this claim, but they called it  
8 a cause of action, the exact same thing that PADI was  
9 completely released from and that they are now trying to  
10 bootstrap around.

11 And if you look down at the next paragraph  
12 in the settlement agreement, the next one is all claims,  
13 causes of action, demands, as set forth in the certain  
14 complaint, in other words, the complaint filed in this  
15 action. These aren't limiting. These folks say we get  
16 to keep our apportionment cause of action that we're now  
17 trying to assert. They're gone. How is justice pursued  
18 by letting them circumvent claims they never had to let  
19 PADI come in and now pursue the claims, perhaps provide  
20 the expert witnesses, and the rest after they've  
21 sanitized the complaint of all the allegations they had  
22 against them and all the judicial admissions that  
23 they've made in the underlying complaint and now  
24 discovery's a month from the end we've all been using  
25 during the depositions and the discovery in this case?

1 There is not any justice when you consider what the  
2 release said and what they're now trying to bootstrap  
3 into an apportionment cause of action.

4 But if you really want to see even more, if  
5 you turn to page 7 of their reply memorandum, it's  
6 really telling. I didn't make a copy of this, so I'll  
7 just read what they said on page 7. They're discussing  
8 our argument about it being brought in bad faith, the  
9 very first paragraph. And so Blue Water next argues,  
10 and then the sentence goes, this argument ignores the  
11 language of the statute --

12 THE COURT: You need to slow down,  
13 generally, but especially when you're reading. I don't  
14 think there's any way the court reporter is getting  
15 everything you're saying.

16 MR. WALDBILLIG: They state right in their  
17 memorandum the fact that while plaintiffs do not believe  
18 PADI was at fault, they don't believe it. There's  
19 something going on here that has nothing to do with  
20 justice. It has to do with some deal that's going on  
21 between PADI and the plaintiffs of which I don't know  
22 that the terms have been disclosed about what's going  
23 on, but that's not how we do things. You must disclose  
24 all of those terms. They don't believe they're at  
25 fault. The settlement agreement says that they have

1 released all causes of action. It doesn't limit it, it  
2 says everything in the world, and including a whole  
3 bunch of other things. And yet they still come forward  
4 today and say, yes, but this is in good faith that we  
5 can do this, yes, this is what should be done, this is  
6 how you allow an empty chair to have their chance to  
7 come forward. The empty chair had a chance to come  
8 forward. It didn't have to settle, it could have stayed  
9 here and presented its case if it wasn't at fault.  
10 There was a whole complaint against them. But instead  
11 there was a little get-together in figuring out a way in  
12 which they can take all the risk they have, no risk, no  
13 downside to any of this, but they can stay and help the  
14 plaintiffs point at Blue Water. That's not justice in  
15 any sense of the term.

16 And when you allege what they allege, and  
17 they say -- you've got to say they're at fault, first  
18 you've got to seek recovery under the statute, but even  
19 if you get past that, now they allege, well, you're  
20 really not at fault, we really don't believe it, we've  
21 settled all our claims, but we're going to apportion  
22 fault? You can't -- you say that with a straight face?  
23 I have a hard time saying that there's justice requires  
24 that we do this, when you throw on top of that -- you  
25 notice the Boy Scouts aren't here, too, by the way,

1 they're not here trying to stick their nose in this like  
2 every other defendant I've ever seen that gets out of  
3 the case. So there is no cross-claim, there's no  
4 cross-claim that exists, we didn't sue PADI, so all we  
5 did was an affirmative defense, which is required under  
6 the statutes and the federal local rules to have the  
7 fault apportioned. So I have to ask, what's their  
8 motive, what's the plaintiffs' motive.

9 I don't even know that PADI has standing to  
10 stand up here and ask for this since they're really not  
11 the party here. It's the plaintiffs making the motion,  
12 we opposed it, they didn't oppose it, and joined in it.  
13 But I suspect they have a reason why they're here, even  
14 though I'm not sure they have standing to even be in  
15 court in light of the court's previous rulings.

16 Now, we talk about even the undue prejudice.  
17 The sanitized complaint, and I think we attached to the  
18 briefing we did kind of an outline of what they took  
19 out, they sanitized it, they took out all their judicial  
20 admissions that we would use to show that in fact, the  
21 facts of this case, both of my clients were volunteers  
22 for the Boy Scouts and/or agents of PADI, therefore,  
23 even if you have recovery against them, we should be  
24 addressing the issues of the agency and the volunteer  
25 statute, which now the two parties involved have both

1 settled out and paid a bunch of money. But they took  
2 all those out, they sanitized it because that wouldn't  
3 look good if you had PADI back in here. And now you've  
4 got to assert these allegations, so you sanitize it, you  
5 take them out, you take out all the judicial admissions  
6 and say they didn't count. That's not the way it should  
7 work. They made those requests, we relied on them --

8 THE COURT: Would you be able to use those,  
9 I assume you would, in the presentation of your case?

10 MR. WALDBILLIG: Well, when you do an  
11 amended complaint, and I didn't find one of these, sort  
12 of like this new ground of adding basically a plaintiff  
13 in the case, I didn't find anything in my quick look  
14 that said when you amend the complaint and it takes over  
15 and it relates back and there's your complaint, what do  
16 you do with the old one. Are they judicial admissions  
17 or are they not judicial admissions when they throw them  
18 out of the new complaint?

19 THE COURT: I don't know what a judicial  
20 admission would say.

21 MR. WALDBILLIG: That there's -- and, I'm  
22 sorry, I didn't bring the case law, but there are a lot  
23 of cases that declare your pleadings and the factual  
24 allegations in your complaint are your judicial  
25 admissions that you can't run from. In other words,

1 they're now admitted for purpose of this case. So when  
2 I say "judicial admissions," I'm saying their pleadings  
3 and their factual allegations they can't now deny them.  
4 If you allow them to amend their complaint, oh, they're  
5 not in there.

6 THE COURT: That's exactly my question. It  
7 would seem to me you would still be able to -- if you  
8 have a representative of the plaintiffs on the witness  
9 stand to talk about the fact that they at one time had  
10 alleged that PADI was in a count, or whatever they said  
11 in the original complaint that isn't in the amended  
12 complaint, am I wrong about that?

13 MR. WALDBILLIG: Well, first I don't think  
14 any representative I could ever put up of the Tuvells  
15 could ever talk about the complaint because my  
16 experience is that clients never even read the  
17 complaint, it's lawyer stuff, which is why the court --

18 THE COURT: The claim's being made by the  
19 client, and you would want the jury, I assume, to know  
20 that at one point in time they had alleged that -- I  
21 don't know if they said you were exclusively a  
22 volunteer, but whatever it is, it would seem to me they  
23 can't, just by amending their complaint, eliminate it  
24 from a fact.

25 MR. WALDBILLIG: Well, they will allege

1 that's not their complaint anymore and that's not their  
2 allegations. And my response is once they've made that,  
3 the courts call it a judicial admission, I shouldn't  
4 make it judge admission, but the case law makes it  
5 called a judicial admission, and once it's in your  
6 pleadings and you've alleged it, you're stuck with it,  
7 you can't now change your course and come around. But  
8 they have taken all those out, they've sanitized  
9 anything that would have pointed back to PADI, they've  
10 taken out all causes of action against PADI, they've  
11 taken out everything against PADI, and then they admit  
12 we've settled with them, we really don't think they are  
13 at fault. And yet they come in here and say please let  
14 us amend the complaint to add PADI back in as a  
15 plaintiff so that they can pursue their claims and help  
16 us go after you with no risk, no liability, no case in  
17 controversy between the plaintiffs and them in the fact  
18 that they're completely released of all causes of  
19 action, which we're right back to what they did the last  
20 time. They now assert a claim, at least we all know  
21 what it says, inserting a cause of action against a  
22 party they said had no claims or causes of action  
23 against them, and they agreed they wouldn't do it.  
24 That's futile. And it doesn't -- justice doesn't  
25 require that that be allowed in these circumstances.



1           The Tuvells are going to be faced with my  
2     client's claim they were volunteers. They didn't get  
3     paid for what they did. They didn't have a contract.  
4     That contract had terminated, they weren't paid for it,  
5     and the Boy Scouts and PADI were the ones that  
6     registered and used, therefore it's in their procedures,  
7     and my clients volunteered for them. And we're going to  
8     claim the volunteer statute. And now taking out the  
9     exact things of which we can use to show that's true is  
10    defeating something we've been relying upon since the  
11    beginning of this case.

12           Ultimately they released it, they new they  
13    released it, they claimed they wouldn't do this, they've  
14    done it again, and justice doesn't require that this  
15    court let them sanitize their complaint and bring in  
16    another plaintiff to help fund the litigation against my  
17    clients.

18           THE COURT: All right. Thank you,  
19    Mr. Waldbillig.

20           Mr. Bullock, please.

21           MR. BULLOCK: Thank you. May it please the  
22    court, counsel. It is inevitable that PADI's fault will  
23    be litigated at trial. Everybody agrees that that issue  
24    is important and necessary. The question is whether  
25    PADI can have the opportunity to participate as a party

1 to defend itself on that issue.

2 At the hearing in April the court had some  
3 questions which we want to address hopefully to the  
4 court's satisfaction. The court raised the question how  
5 can you have a cross-claim against a party that is not a  
6 defendant? Whether PADI can have a chair that it can  
7 occupy during the trial to defend itself, I don't know,  
8 I'm not ruling on that. And the court was glad to  
9 entertain motions or requests about the right of an  
10 entity to defend itself when it has become a nonparty to  
11 the extent that anyone wants to bring them, and that's  
12 what Tuvell has done. And, as a matter of fact, PADI  
13 agrees that this procedure is correct. The answer to  
14 the court's concern is that Section 821 provides the  
15 substantive rule allowing this joinder.

16 As an aside, in the *Corporation of the*  
17 *Presiding Bishop v. Clean Carpet* case Judge Campbell  
18 decided that this was the way to go, understanding that  
19 that's not controlling on this court, but it may be  
20 helpful.

21 We know that the first rule in interpreting  
22 a statute is the plain meaning of the words of the  
23 statute. Section 821 is not limited to existing  
24 parties. It says, A person seeking recovery, Tuvell in  
25 the case, may join as a defendant any person for the

1 purpose of having determined their respective  
2 proportions of fault. The section does not in any way  
3 limit the person seeking recovery, Tuvell, to join  
4 persons Tuvell intends to claim damages against.  
5 Rather, the statute says for the purpose of having  
6 determined their respective proportions of fault. What  
7 it does not say is for the purpose of seeking damages.  
8 So the section clearly seems targeted at providing a  
9 mechanism for joinder as a defendant for allocation of  
10 fault with no accompanying damages claim.

11 As a party, PADI should be entitled to  
12 participate to the extent that the Federal Rules provide  
13 for rights and duties of parties. Important, PADI's  
14 presence as a party will not deprive Blue Water of any  
15 opportunity to adduce evidence and make arguments which  
16 it would otherwise have. We've heard from Blue Water  
17 about the release. However, that's not available to  
18 Blue Water. The release is a contract between the  
19 parties to it, Tuvell and PADI, and Blue Water was not a  
20 party or an intended beneficiary. The release belongs  
21 to PADI to invoke as a defense, if it wishes to do so,  
22 and Blue Water is a stranger to it.

23 If the court is inclined to look at the  
24 release, the release does not prevent Tuvell's motion.  
25 Again, the release is a contract. The first rule of

1 interpretation of contracts is to interpret all  
2 provisions harmoniously, if possible, in a way which  
3 gives meaning to all provisions and leaves no part of  
4 the contract meaningless. As the court has correctly  
5 observed, the reference to settlement of all claims is  
6 in the same sentence as the reference to damages. And  
7 wherever settlement of claims and causes of action is  
8 mentioned throughout the release, it's in close  
9 proximity to damages, and that's what's being released.

10 On the other hand, there is a very explicit  
11 paragraph which the parties evidently thought was so  
12 important that they put it in bold face, PADI desires  
13 and intends to remain a party to this action, to the  
14 extent the court will allow, in order to defend the  
15 professional reputation of PADI and to defend and  
16 represent PADI employees and agents who may be witnesses  
17 in this action. So there's really no ambiguity, no  
18 misunderstanding about the intent of the release when  
19 it's read in its entirety.

20 We have seen two recent awards, one was a  
21 jury verdict and one was a trial to the court in federal  
22 court in recent years, for the death of a child, and  
23 they were both perhaps, I don't know if it's a  
24 coincidence, in the amount of \$3 million. So given the  
25 opportunity to buy its peace for \$800,000, PADI --

1 PADI's decision was reasonable.

2 I agree it's unusual for a defendant to want  
3 to stick around. My experience is the same, as we've  
4 heard, they want nothing more than to skate off into the  
5 sunset. But the mechanism exists, the statute says what  
6 it says.

7 I could imagine instances like this one, and  
8 my imagination is not terribly broad, but I thought,  
9 okay, pharmaceutical litigation, which occurs repeatedly  
10 involving the same products, tire accident litigation,  
11 medical product litigation, and I'm sure there are more  
12 and better examples of where this rule would be -- could  
13 be and should be applied to benefit to a good result.

14 And I must speak to the implication that  
15 there's any further side deal or secret agreement. I'm  
16 not aware of any such thing. It seems to me that if  
17 Blue Water is genuinely suspicious, they can conduct  
18 discovery on that issue if they want to. There's no end  
19 run, there's no evidence of any end run, so it doesn't  
20 seem reasonable to suggest an end run, no secret terms.

21 The law favors settlements, including  
22 presumably partial settlements. We do think we're the  
23 good guys here, we're trying to move it in a healthy  
24 direction. What is sought is reasonable, the statute  
25 expressly explicitly allows it. Another district court

1 thought it was the way to go, and the motion should be  
2 granted.

3 THE COURT: All right. Thank you,  
4 Mr. Bullock.

5 Mr. Gilchrist.

6 MR. GILCHRIST: Thank you, Your Honor. Just  
7 briefly, not to rehash things, but the facts are what  
8 they are. If they were volunteers, in which we  
9 adamantly deny because they received money, then they're  
10 volunteers, and they'll get out of the case as  
11 volunteers. They want to use, they being Blue Water,  
12 the same verdict form that we do, you know, list PADI on  
13 it. They haven't said they don't want PADI on the  
14 verdict form, they just don't want PADI to participate  
15 in regards to defending themselves as PADI wants to do.  
16 The settlement agreement says that it is the entire  
17 agreement between the parties. There is no other  
18 agreement, there's no you-get-some-money-back agreement  
19 or some kind of Mary Cutter agreement or anything other  
20 than what's in this agreement. As Mr. Bullock said,  
21 it's included in the agreement that PADI wants to remain  
22 in the case to defend its reputation. My understanding  
23 is there's a number of cases throughout the United  
24 States involving these similar defendants, at least the  
25 insurance company for Blue Water and PADI, and Mr. Hall

1 represents a few plaintiffs, and so that's why the  
2 reputation and how they align and fight these things  
3 impacts in this case and why they want to stay involved  
4 in this case.

5 The original complaint exists. If we allege  
6 something in there they can bring that to someone's  
7 attention. It doesn't magically go away. If we amend,  
8 if that was the case, I would amend a lot of complaints  
9 because I've made a few mistakes in what I've pled.

10 THE COURT: That's what I would think.

11 MR. GILCHRIST: Yeah, I wish that was true.  
12 It would be a good way to write things out. I don't  
13 know how justice will be any different if PADI is on the  
14 verdict form like they want or like we want, and PADI  
15 just has the ability to defend itself.

16 THE COURT: Does that mean that PADI would  
17 have the ability to call witnesses just like any other  
18 party, even though it's in kind of this odd status as a  
19 party against whom liability isn't being sought by  
20 anybody, it's just there for allocation of fault, and so  
21 do they have all the rights of any party because you're  
22 going to sue them for this limited purpose?

23 MR. GILCHRIST: They remain a party, I would  
24 think they would. That's an interesting question.  
25 There's other things that could tie into that, where

1     they sit for one thing.

2                 THE COURT:   A sort of quasi party.

3                 MR. GILCHRIST:  Yeah.  But the statute says  
4     they can be added for that purpose.

5                 THE COURT:  It could have been more cleanly  
6     written, it seems to me.

7                 MR. GILCHRIST:  I agree.  It should say  
8     proportionate share of fault, rather than proportions,  
9     but that's just picking the language.

10                THE COURT:  And even to add the words for  
11     which recovery is sought.  There is no recovery sought  
12     by you now against PADI.

13                MR. GILCHRIST:  Any other person who caused  
14     or contributed to the injury or damages for which -- it  
15     is the injury for which recovery is sought, that's what  
16     the injury is.  It can't be something unrelated, but,  
17     right, it's poorly worded.

18                THE COURT:  Unless you -- unless that  
19     pertains only to the any person, other than a person you  
20     knew who caused the injury or damage for which  
21     recovery -- I just think it could have been a little  
22     cleaner to say exactly what you're saying it says.

23                But tell me this, and I'm probably just too  
24     curious, I'm not saying it's going to matter a lot, but  
25     as a sort of a practical matter and a fairness matter if



1 a plaintiff gets hurt and the injury is caused by, let's  
2 say, two different actors, let's say a person gets hurt  
3 because they're standing on the side of a road and two  
4 cars collide, and one of them runs a red light and the  
5 other one then got crashed into by the one that ran the  
6 red light and then the crash pushes into the individual  
7 and that individual ends up hurt and it sues both of  
8 them. I'll call the party that ran the red light A and  
9 I'll call the party that got hit by the party that ran  
10 the red light B. And so the plaintiff sues and alleges  
11 negligence on both of the parties' parts. There's a  
12 stronger case by anyone looking at the evidence, any  
13 objective look, is against the person A who ran the red  
14 light. But they also have this sort of softer claim of  
15 negligence against the other one for not keeping a  
16 proper lookout or something like that, or maybe going a  
17 little too fast, maybe above the speed limit, so you've  
18 got something on them, even though they did have the  
19 green light and they were entitled to go through, but  
20 the notion is if they had been keeping a better lookout  
21 or going the speed limit, they wouldn't have been in the  
22 intersection, and so you had a combination of two  
23 negligent acts which -- from which produced a crash and  
24 which caused injury to the plaintiff, right?

25 MR. GILCHRIST: Yes, gotcha.

1 THE COURT: Okay. So then let's say that  
2 the plaintiff settles with defendant A.

3 MR. GILCHRIST: Red light.

4 THE COURT: The red light runner for a  
5 million dollars. Now, they've only got the case left  
6 against B, but A wants to come in and defend itself, or  
7 himself, which is exactly what would be happening here.  
8 And the plaintiff suddenly is not pursuing with any  
9 vigor any claim against A at trial, but, oh, yeah, maybe  
10 he ran the red light, but it wasn't that bad, it had  
11 only been red for a little while or something, anyway  
12 takes an entirely different tact than the approach they  
13 had been taking before when they were contemplating  
14 bringing a lawsuit and trying the case against both of  
15 these two parties. In that kind of a circumstance how  
16 much does the jury get to know? Is the jury entitled  
17 then, do you think, to be told about the fact that, you  
18 know, the plaintiff is being a little inconsistent here,  
19 in fact a lot inconsistent. Before, the case against B  
20 was just sort of a tagalong, in fact the big percentage  
21 of fault was going to go to A, and you, jury, should  
22 understand that the reason the plaintiff is so  
23 inconsistent now with the position they took in their  
24 original complaint and their original approach to this  
25 case is because they settled with A for a million

1     dollars.   What do you say to that?

2                 MR. GILCHRIST:   That happens all the time,  
3     except you can't say the million dollars.   The law says  
4     that's why they're here because they settled for -- they  
5     can say a lot of money or they settled -- they just  
6     can't say a million dollars, but they can say all that  
7     had happened to me and they can say look at the expert  
8     reports, the expert reports so far say it's all red  
9     light person, but now they're coming in here and they  
10    won't call that witness, or that witness has changed,  
11    and look at their complaint, look at what the  
12    police officers --

13                THE COURT:   The jury can get educated on  
14    that.

15                MR. GILCHRIST:   Oh, yes.

16                THE COURT:   And they can be informed of the  
17    existence of the settlement.

18                MR. GILCHRIST:   Correct.   And that's why all  
19    of a sudden these things have changed, and that's why  
20    now, we, the plaintiff's lawyer, is blaming this poor  
21    innocent person who may have been going two miles over  
22    the speed limit, rather than the drunk driver who ran  
23    the red light.

24                THE COURT:   So that's why I say in terms of  
25    fairness, if that's the -- I don't do a lot of these

1 cases. Is this here on diversity, or why have I got it?  
2 So if I did more, then I would know the answer to those  
3 questions a little better. Well, that's interesting.  
4 It appears that at least Mr. Bullock agrees with you.  
5 Mr. Waldbillig seems to be shaking his head, but if he  
6 thinks that's correct, then he's indicated that he's not  
7 going to object to your effort to help the jury  
8 understand those kinds of facts.

9 MR. GILCHRIST: Well, they get to bring up  
10 the fact that this settlement's occurred.

11 THE COURT: Yes.

12 MR. WALDBILLIG: Yeah, there's the  
13 settlement. It's not all the rest, it's not here's how  
14 it was aligned. I can't even imagine a judge allowing  
15 me to get up and talk about what the motivations were or  
16 how the issues got to where they were to now. But take  
17 your example and say now A sits with the plaintiff and  
18 the A helps point at B. A says I didn't do anything  
19 wrong, it was really if he hadn't been driving that one  
20 mile an hour over the speed limit, or if he had just  
21 looked up a half second sooner, this would not have  
22 happened. So suddenly it's really twisted as to who has  
23 the real interest in what's going on in the case and  
24 who's really pursuing it. The jury will never get to  
25 know that, and they'll object to the end of the world

1 for me to try and tell the jury how that happened.

2 THE COURT: How would you -- why would you  
3 be prevented from letting the jury know about that?

4 MR. WALDBILLIG: To lay out what happened in  
5 this case and how the parties settled and how they  
6 wanted to go about doing it and how the most -- the jury  
7 is never going to understand it to begin with. But  
8 really it's turning the system on top of its head to  
9 allow basically two plaintiffs to now pursue one  
10 defendant when in reality he was really a defendant  
11 until he settled. That's what will happen. It won't be  
12 that the plaintiffs' pursuing it, it will be PADI will  
13 do all the work and the plaintiffs will sit back and go,  
14 thank you, PADI, you're doing a great job in proving our  
15 case for us, which is what they would have had to do  
16 anyway. They would have to prove exactly what PADI did,  
17 but they want PADI to come on after they've settled and  
18 they agreed never to be in conflict.

19 This doesn't have so much to do with the  
20 settlement agreement as it does the candor to the court  
21 about what's going on here, the fact there's a case in  
22 controversy, the fact of whether they can make these  
23 allegations in good faith on a factual basis. That's  
24 what we're talking about in terms of this amendment.  
25 And they can't do that, and to let this happen -- we'll

1 have -- if you do let it happen, but I don't believe a  
2 jury will ever get it. This is something way above that  
3 level.

4 THE COURT: Okay. Thank you.

5 MR. GILCHRIST: The jury will understand  
6 that we sued PADI originally and he can use now I've got  
7 a complaint and an amended complaint and he can show  
8 them how inconsistent and when the settlement occurred.  
9 It happens all the time. They say they've settled out,  
10 that's why they don't want to blame -- usually they  
11 don't have the red light sitting there, but always have  
12 them saying it's all his fault, where are they, why  
13 aren't they here today, if they think it isn't their  
14 fault, blah, blah, blah, blah. It happens all the time,  
15 and juries, well, they seem to --

16 THE COURT: What percentage of fault do you  
17 have to put on Blue Water to get a recovery from them?

18 MR. GILCHRIST: What percentage --

19 THE COURT: I'm just trying --

20 MR. GILCHRIST: Well, if the plaintiff is  
21 50 percent, then I don't get it. So if they're --

22 THE COURT: You need to get 51 percent?

23 MR. GILCHRIST: Well, PADI is on the verdict  
24 too because they're going to put them on the verdict.

25 THE COURT: I'm thinking of that verdict,

1 Boy Scouts, PADI, Blue Water.

2 MR. GILCHRIST: If they want the Boy Scouts  
3 still on, which they will, they also want --

4 THE COURT: That's just what I'm assuming.  
5 What number do you need to get allocated against Blue  
6 Water in order to get a recovery against them?

7 MR. GILCHRIST: 1 percent if -- I've got to  
8 keep my hands clear.

9 THE COURT: It doesn't bother me.

10 MR. GILCHRIST: Uh, it bothers me. 1  
11 percent if the total -- with PADI, the Boy Scouts,  
12 whoever else, they've added doctors, they've added the  
13 other --

14 THE COURT: Okay. I had forgotten about  
15 that.

16 MR. GILCHRIST: If the plaintiff is less  
17 than 50, then I can get that 1 percent from them. If  
18 they're zero, I can't get anything from them.

19 THE COURT: If you get 1 percent from them  
20 and you're, the plaintiff, is less than 50, how much  
21 does that allow you to collect from that 1 percent?

22 MR. GILCHRIST: 1 percent.

23 THE COURT: Only 1 percent.

24 MR. GILCHRIST: That's why they want PADI on  
25 the verdict, that's why they want the Boy Scouts, they

1 want the other child because --

2 THE COURT: Right. But it isn't a joint and  
3 several thing --

4 MR. GILCHRIST: No.

5 THE COURT: -- like it was 25 years ago.

6 MR. GILCHRIST: Yeah, it shows both of us --  
7 I remember when that's how it was, and then they could  
8 sue for contribution and cases never ended. No, 51  
9 percent, if they're 1 percent.

10 THE COURT: They only have to pay for their  
11 percent.

12 MR. GILCHRIST: Yes, whether PADI's standing  
13 here or not because they want the Boy Scouts on the  
14 verdict, they want PADI on the verdict, just everybody  
15 else. That's -- they just don't want PADI to come in  
16 and explain --

17 THE COURT: To defend itself.

18 MR. GILCHRIST: Yeah. Mr. Waldbillig's a  
19 good lawyer, so is Mr. Concannon, they'll show what a  
20 conspiracy is between us and we're helping each other  
21 out and what PADI is doing, and the original complaint,  
22 and they settled and all --

23 THE COURT: You at least anticipate a  
24 relatively full illumination of the picture.

25 MR. GILCHRIST: I would think they would,



1 they're pretty good lawyers, and they can do that,  
2 that's their job. It's always happened with other  
3 lawyers, lawyers who have lesser abilities than these  
4 gentlemen for them to do that. I think they  
5 underestimate their persuasiveness with the jury.

6 THE COURT: All right. Thank you,  
7 Mr. Gilchrist.

8 Mr. Waldbillig, anything to respond?

9 MR. WALDBILLIG: No. I think I got my shot  
10 in there in the middle of Mr. Gilchrist's avenue of  
11 comparing whether they've in fact got a basis to even  
12 make the allegation under the statute, whether they can  
13 make it, when they say they're not at fault, but they do  
14 it anyway, they change all their original complaint to  
15 do it. I just think at that point that justice doesn't  
16 require that this court allow them to amend their  
17 complaint to do what is questionable under the release  
18 and under the statute at this point in the case with  
19 less than a month before the end of discovery in this  
20 case, I don't think that justice gets us to that level.

21 THE COURT: You think it's more just to let  
22 you point your finger at an empty chair that can't  
23 defend itself?

24 MR. WALDBILLIG: The chair is never empty.  
25 They got their settlement money, they have -- by "they,"

1 the plaintiffs, have every incentive, just like in every  
2 other case I'm in, to defend the lack of liability of  
3 every one of those other defendants, the Boy Scouts and  
4 PADI, and everyone else because they don't want us to  
5 get 1 percent, they want PADI to get zero, they want the  
6 Boy Scouts to get zero, they want the plaintiffs to get  
7 zero, and they want 100 percent on Blue Water because  
8 then, the only question is how much do they get out of  
9 the whole verdict after we take into account all the  
10 money they've already collected from all these parties  
11 that they've previously had very long allegations of all  
12 of their fault, and you superimpose that with one of  
13 those party's now also helping the claim that they're  
14 not at fault, that it's all Blue Water, that to me is  
15 twisting what the purpose of the statute was. But  
16 plaintiffs are very ample --

17 THE COURT: If they get, let's say, a \$3  
18 million verdict against you, 100 percent against you,  
19 and zero against everybody else who's on the form, then  
20 they would subtract the 800,000 they paid to PADI (sic)?  
21 I didn't get that straight.

22 MR. WALDBILLIG: They also have the money  
23 from the Boy Scouts. Yes, that would be our position is  
24 is that you don't get to collect twice.

25 THE COURT: Mr. Bullock and Mr. Gilchrist

1 don't --

2 MR. WALDBILLIG: They'll say, but that's not  
3 the case.

4 THE COURT: You've got them ganging up on  
5 you already because they both had negative stakes of the  
6 head.

7 MR. GILCHRIST: Then PADI made a really bad  
8 deal if they paid 800 and they weren't at fault. No,  
9 they wouldn't get credit for 800,000. That's the joint  
10 and several again if that were --

11 THE COURT: That's the only way -- okay.

12 MR. BULLOCK: That's pretty well  
13 established.

14 THE COURT: Well, he said it.

15 MR. WALDBILLIG: They'll argue it.

16 THE COURT: Okay. That's later. I  
17 didn't -- did I let the doctors stay in? I thought --  
18 didn't we have a motion on that?

19 MR. WALDBILLIG: They're out. It's only on  
20 the affirmative defense to apportion fault. They're not  
21 a party.

22 THE COURT: So they will be on the verdict  
23 form.

24 MR. WALDBILLIG: If the facts come out as  
25 they're coming out in the case, yes.

1 THE COURT: That's to be determined?

2 MR. WALDBILLIG: They're on it now. I guess  
3 when we get to the end of discovery next month and the  
4 decisions on motions and the rest, there may be a  
5 different decision.

6 THE COURT: All right. The best I can do is  
7 the best I can do to interpret this Utah statute, and I  
8 cannot read it the way Mr. Waldbillig wants me to, nor  
9 can I find in the agreement, the settlement reached by  
10 the plaintiff and PADI, anything that obligates the  
11 plaintiff to not bring this motion for leave to file an  
12 amended complaint. In fact, I think it's consistent  
13 with their release in their settlement agreement.

14 I also don't think that Mr. Waldbillig's  
15 client has standing to complain about whether that  
16 settlement agreement and the release was breached or  
17 not. Neither side to the contract feels that it's  
18 breached. And they do have a specific provision  
19 recognizing that as far as the law would allow that PADI  
20 desires to remain a party in the case, if possible,  
21 under the law to defend itself against any allegations  
22 of wrongdoing. The statutory provision reads that A  
23 person seeking the recovery, and that is the plaintiff,  
24 may join as a defendant any person, other than a person  
25 in the interim suit, and that's in the next section, any

1 person alleged to have caused or contributed to the  
2 injury or damage for which recovery is sought for the  
3 purpose of having determined their respective  
4 proportions of fault. It's not perfectly clear, but I  
5 think that it's clear enough that the only proper  
6 interpretation is to allow the amended -- to grant the  
7 motion and allow the amended complaint to be filed.

8 I will hold open for any additional comments  
9 you want to make today, Mr. Waldbillig, but I want to  
10 rule on it now, whether you have any additional comments  
11 to make about your argument that there's something  
12 unfair in the way the plaintiffs have removed some of  
13 the prior verbiage in their previous complaint. That's  
14 a separate issue. I could, I suppose, simply allow the  
15 complaint to be amended to allege this new  
16 apportionment-only cause of action against PADI, and  
17 not, as you say, sanitize it by removing all of the  
18 allegations about who is an agent of whom and who was  
19 doing what. I'm inclined to let them amend the  
20 complaint as they have moved, but I don't think I've  
21 heard you out completely on that, or I don't think I  
22 understand it completely. Now that I'm letting them add  
23 their claim of allocation against PADI, do you have  
24 anything additional you want to say on that subject?

25 MR. WALDBILLIG: Your Honor, my only point

1 is is that in the original complaint, as we move forward  
2 now as a party whose fault is being apportioned, new  
3 ground whether they get to be assumed a defendant and  
4 they're going to call witnesses and they're going to go  
5 to depositions, they're going to do whatever else, I  
6 think even if you read the statute as you're reading it  
7 and you don't read the settlement agreement to say they  
8 can't make the allegations they're making in good faith,  
9 at least the allegations that are the basis they're  
10 seeking the fault allocation, which is in their  
11 complaint, should remain, rather than just throw them  
12 all out, which they've made all these admissions as to  
13 why they're allocating fault, why PADI's at fault, why  
14 the Boy Scouts are at fault, why all these people, we're  
15 taking all those out and saying we start anew with an  
16 amended complaint that's basically sanitized all of what  
17 I call the judicial admissions that we're going to rely  
18 on going forward and would explain to the jury why  
19 what's happened in this case and why the claims are  
20 against PADI and the Boy Scouts and the rest, rather  
21 than now holding up the complaint in which you'll never  
22 find any of those because the only allegations against  
23 them are two sentences in this apportionment cause of  
24 action, of which they don't really say much. And now we  
25 know, in addition, they're going to get up in front of

1 the jury and say and we don't believe PADI was at fault.

2 THE COURT: All right.

3 Mr. Gilchrist, on that point, what are you  
4 going to tell me, that it's customary to do this?

5 MR. GILCHRIST: I'm not sure I quite tracked  
6 what he said. I'm not sure what he wants to do. I'm  
7 sorry, so I'm not --

8 THE COURT: I'm not entirely sure either,  
9 which was true the first time around, which is why I  
10 asked for additional comment. I've ruled on the main  
11 thing you want to do, but you also want to change your  
12 complaint quite a bit and remove all of those  
13 allegations that supported fault and wrongdoing against  
14 PADI. He doesn't think that's fair.

15 MR. GILCHRIST: And also the Boy Scout  
16 provision.

17 THE COURT: He doesn't think that's fair.  
18 And I guess because he thinks that the jury is going to  
19 be seeing the complaint? I'm not sure I understand  
20 exactly why you think this is so important to you,  
21 Mr. Waldbillig, either.

22 MR. WALDBILLIG: The use of the allegations  
23 of the complaint that outline how the fault, outlined  
24 vicarious liability, outlined the agency, which --

25 THE COURT: How do you get to use them

1 better if that is still the complaint that controls the  
2 case as opposed to this new sanitized version?

3 MR. WALDBILLIG: Well, and that's what I  
4 thought the court was asking me. To me, at that point,  
5 if they want to add PADI in, then what the court asked  
6 me was should we just add the one cause of action to the  
7 original complaint.

8 THE COURT: Right.

9 MR. WALDBILLIG: And my response was yes,  
10 because we should be able to keep the basis on which  
11 they are going to apportion fault to PADI that they  
12 claim and also the basis of all of the other claims that  
13 they're going to try and apportion, we should be able to  
14 use all those admissions and things that they've alleged  
15 as we move forward in a defense of the Blue Water  
16 defendants.

17 THE COURT: I think the only basis for  
18 apportioning fault would be the evidence presented at  
19 the trial, won't it, not what they've alleged, but what  
20 they prove at trial?

21 MR. WALDBILLIG: We will use as part of our  
22 motions -- we are going to file motions for summary  
23 judgment -- exact factual allegations they have made in  
24 the complaint as judicial admissions that they can't  
25 retract, they can't go back against, we will also say



1 those are judicial admissions in that original complaint  
2 to show that we should be volunteers, and, if not, the  
3 court finds a question of fact, we want to be able to  
4 use those as alleged, they've alleged that. That's what  
5 they alleged.

6 THE COURT: Well, those don't vanish. It's  
7 not like one of those Etch-A-Sketch things and once you  
8 rip it up it's gone forever. It's still there, it was  
9 something they alleged at one point in time. That's  
10 what I was trying to explore with you earlier. They  
11 don't go away. That's just that the new complaint  
12 frames the issue in a different manner, and that doesn't  
13 eliminate your opportunity to explain that as  
14 appropriate under the Rules of Evidence to a jury.

15 MR. WALDBILLIG: Their complaint doesn't  
16 include all of the products liability claims, the  
17 failure to warn, the breach, all of the claims that were  
18 against PADI, none of those are in there. Now the only  
19 allegations you will find about the fault of PADI are  
20 only contained in two paragraphs, we signed a settlement  
21 agreement, if there's responsibility for anything that  
22 they have done, they should have to pay for it. All the  
23 rest of the allegations that they have made throughout  
24 the case are gone. Whether we can -- we'll see, I've  
25 not researched it, but to my mind once you have an

1 amended complaint, they'll argue no, we're dealing with  
2 this complaint, that complaint's been superseded and  
3 gone.

4 THE COURT: Well, I think I've said at least  
5 three times today it doesn't go away, it's still there.  
6 Frankly, it will help the court if I have a complaint  
7 that's current from which to prepare a pretrial order  
8 for purposes of anticipating what will be admissible and  
9 pertinent to a trial.

10 MR. WALDBILLIG: The basis on which the  
11 plaintiff has asserted their claim for apportionment, at  
12 least against PADI, I suspect their argument against the  
13 Boy Scouts, Boy Scouts they didn't sue, will be the  
14 basis of the original complaint, if it's still there.  
15 If you allow the amended complaint that they're  
16 proposing, what will their basis be that they'll pursue  
17 for that apportionment of fault? There won't be  
18 anything because they won't pursue it.

19 THE COURT: Only the facts that come in.

20 MR. WALDBILLIG: On the relevance of the  
21 claims they made against PADI? I don't think they're  
22 going to pursue the apportionment claim. What will  
23 happen is PADI will pursue that. They have no interest  
24 in it, so this is PADI pursuing it, not the plaintiffs.

25 THE COURT: And from what Mr. Gilchrist

1 said, the jury will be -- you'll be entitled to inform  
2 the jury that the settlement was reached, and the jury  
3 will understand why the plaintiff isn't pursuing with  
4 any vigor, or at all, claims of wrongdoing against PADI  
5 and why they're focused like a laser on you.

6 MR. WALDBILLIG: And the jury ought to be  
7 explained why PADI is now where PADI is basically with  
8 the plaintiff in this case, rather than the defendant  
9 and what PADI's interests and motivations are in what's  
10 going on in this case.

11 THE COURT: Well, that seems like the  
12 easiest thing in the world to understand. Why won't the  
13 jury understand that? Oh, the plaintiffs used to be  
14 blaming driver A and now they don't have any incentive  
15 to blame driver A anymore because they settled with  
16 them, and driver A here is also blaming driver B. I  
17 think that goes on all the time.

18 MR. WALDBILLIG: A year from now, Your  
19 Honor, when we are back here fighting over what the jury  
20 will be instructed, we won't be talking about all these  
21 things that they'll be instructed, they'll be instructed  
22 that they reached a settlement, the amount's not  
23 important, that's what they'll be told. I'm confident  
24 they will argue that that's all they need to be told.

25 THE COURT: It may be that the jury will be

1 told that the amount will not be divulged to them. I'm  
2 assuming that's probably the customary practice, that we  
3 don't put amounts, and the jury will be told that there  
4 was a settlement reached. And Rule 408 doesn't keep  
5 that out.

6 MR. WALDBILLIG: But will they be told that  
7 the plaintiffs entered into a settlement agreement that  
8 allowed PADI to stay in the case with them in order to  
9 defend the case against Blue Water, and they'll never  
10 get that detail. So the benefit of what the allegations  
11 were in the original complaint versus what they are  
12 claiming now will be lost. I don't believe that a year  
13 from now when the court looks at this and says, well,  
14 I'm not going to tell the jury all that because none of  
15 this is going to be fresh anymore, it will be long gone,  
16 and we will lose the issue about what really happened in  
17 terms of the original complaint and what happened in the  
18 amended complaint, what the allegations were.

19 THE COURT: All right. Anything else?

20 MR. GILCHRIST: We can have a jury  
21 instruction about the settlement saying that even though  
22 PADI is settling, it believes that Blue Water, Lowell  
23 Huber, and Douglas acted improperly, and were the  
24 primary, if not the sole cause of the event, we'll so  
25 stipulate. I mean that's easy. If he wants really --

1 if he really wants that language, it would be bad for  
2 him. That would explain what happened and why they  
3 settled, they were protecting their good name. So  
4 that's -- sure, if he wants the jury to know that, we  
5 can stipulate, but that's a long way down the road.

6 THE COURT: Well, on the narrow issue of  
7 whether the other allegations that have been changed  
8 from the first complaint to this proposed amended  
9 complaint, I will allow it. I am recognizing now that  
10 that does not eliminate the previous complaint from  
11 being referred to in all appropriate ways to explain  
12 something either to the court in a motion for summary  
13 judgment or, if it complies with the rules of evidence,  
14 to a jury during the trial.

15 I don't see how it's -- it's interesting,  
16 but I don't see how it's really unfair to a defendant  
17 like Blue Water, who wants to allocate fault to PADI, to  
18 allow PADI to defined itself against those allegations  
19 in the trial. I would think that it's rare that a  
20 defendant, a codefendant, wants to stick around and  
21 defend itself. But it also isn't unusual to expect a  
22 situation where a defendant would want to spend the  
23 money and time to defend its good name in a case where  
24 they're being blamed for something like a wrongful  
25 death. Blue Water seems to want to have the advantage

1 of being able to point a finger against PADI without  
2 letting PADI have any right to defend itself directly in  
3 open court and to put that burden only on the plaintiff.  
4 So I don't know what's so wrong with this. I might be  
5 missing something, but I've ruled, the motion is  
6 granted.

7 Did you say a year from now? Can't we get  
8 this done quicker than that?

9 MR. WALDBILLIG: I can make it more  
10 specific, Your Honor, because the scheduling order  
11 says --

12 THE COURT: Maybe it is a year from now.

13 MR. WALDBILLIG: Final pretrial is  
14 September 21, 2015, the trial starts on October 5th.

15 THE COURT: It is a year from now. Well,  
16 I'm sure you're going to have a delightful year  
17 together, and I will see you back here sometime between  
18 now and a year from now, if we hold that schedule.

19 Thank you for your arguments. They have  
20 been very helpful and very good. If there's nothing  
21 else, we're in recess.

22 (Whereupon, the matter was concluded.)

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C E R T I F I C A T E

State of Utah

County of Salt Lake

I, Karen Murakami, a Certified Shorthand Reporter for the State of Utah, do hereby certify that the foregoing transcript of proceedings was taken before me at the time and place set forth herein and was taken down by me in shorthand and thereafter transcribed into typewriting under my direction and supervision;

That the foregoing pages contain a true and correct transcription of my said shorthand notes so taken.

IN WITNESS WHEREOF, I have hereunto set my hand this 28th day of October, 2014.

Karen Murakami

Karen Murakami, CSR, RPR